No. 16,048

United States Court of Appeals
For the Ninth Circuit

RALPH GEISE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court for the District of Alaska, Third Division.

BRIEF FOR APPELLEE.

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JURISDICTIONAL STATEMENT.

Appellant was convicted after a jury trial in the District Court, for the District of Alaska, Third Judicial Division at Anchorage, Alaska, of the crime of Statutory Rape, (65-4-12 ACLA 1949.) The court imposed the sentence of imprisonment for the period of appellant's natural life, said sentence to commence and begin on the 28th day of April, 1950. Jurisdiction below was conferred by 48 USCA 101 and 28 USCA 2255. Jurisdiction in this court is conferred by 28 USCA 1291.

STATEMENT OF FACT.

Appellant was indicted for the crime of Statutory Rape, a violation of Section 65-4-12 ACLA 1949

(R-33). Trial was held in the District Court for the District of Alaska, Third Judicial Divsion at Anchorage, Alaska, and on April 28th, upon a jury's verdict of guilty, appellant was given a sentence of imprisonment for the period of his natural life (R-34). It appears that the appellant is still serving this term as an inmate of the Federal Penitentiary at McNeil Island, Washington (R-17).

The District Court appointed attorney William H. Olsen of the Anchorage Bar to represent the appellant (R-8).

At the trial, after the jury had been selected, but before any evidence was offered, the prosecutor moved the court for an order removing spectators from the trial (R-15). The court, pursuant to the motion made by the prosecutor, ordered all spectators or members of the audience, except members of the press, members of the bar, relatives and close friends of the defendant and of the prosecuting witness, or any other witness under age, and witnesses generally, excluded from the courtroom (R-16).

The original file of the clerk of the court has been sent forward to this honorable court and without resort to the original file of the clerk, there is nothing presently available to enable appellee to ascertain whether or not the appellant and his counsel did, as a matter of fact, object at the time it was given to instruction in No. 5 of the trial judge's charge to the jury. In any event, the instruction as set forth on page 3 of the appellant's brief is in error and does not include the entire instruction as given by the trial

judge. Attorney for the appellant is also guilty of another error on page 3 in his brief where he alleges that the parties are filing herein a stipulation concerning the giving of the foregoing jury instruction since no stipulation has been entered, or will be entered.

Following his conviction and sentence, the appellant moved the court for a new trial upon the grounds that the court erred in granting the government's motion to exclude the public from the trial of the case (R-16). This motion was denied by the trial judge on July 27, 1950 (R-16, 17).

On August 5, 1950, appellant petitioned the District Court for leave to appeal *in forma pauperis,* stating as grounds for the appeal that the trial judge erred in excluding the public from the trial of the case and erred in charging the jury on the presumption of innocence in instruction No. 5 (R-3). Permission to proceed in the prosecution of the appeal *in forma pauperis* was denied by the trial court on August 11, 1950 (R-17).

In 1951 the appellant applied to this court for leave to appeal *in forma pauperis* and in an order filed on May 24, 1951, the application was denied (R-4).

A motion to vacate and set aside appellant's sentence under 28 USCA 2255 was filed in the District Court on January 3, 1958 (R-5). See *United States v. Geise,* 158 F. Supp. 821 (1958). This motion was denied by the District Court on April 9, 1958 (R-25-29). From the order denying the motion to vacate the sentence the present appeal is taken.

ARGUMENT.

I. THE EXCLUSIONARY ORDER OF THE TRIAL JUDGE WAS NOT SO BROAD UNDER THE CIRCUMSTANCES, AS TO VIOLATE THE RIGHT OF PUBLIC TRIAL GUARANTEED BY THE SIXTH AMENDMENT.

The exclusionary order complained of is found in the record on page 16. It reads as follows:

> ". . . All spectators or members of the audience except members of the press, members of the bar, relatives and close friends of the defendant, and of the prosecuting witness or any other witness under age, and witnesses generally, are excluded from the court room."

As was pointed out by this court in the case of *Reagan v. United States,* 202 Fed. 488 (9th Cir. 1913), there is no provision of the Code of Alaska guaranteeing to the defendant in a criminal case the right to a public trial. The right of the accused to demand a public trial is found in the Sixth Amendment to the Constitution, which provides that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial. The term "public trial" is a relative term and as was pointed out in *Reagan v. United States, supra,* the trial was not by the exclusionary order rendered a secret trial, it was still a public trial by the terms of the exclusionary order as members of the press, members of the bar, relatives and close friends of the defendant, and of the prosecuting witness and others were admitted into the courtroom. This constituted a sufficient number of the public to see that the accused was fairly dealt with and not unjustly condemned. In accord is *Callahan v. United States,* 240 Fed. 683 (9th Cir. 1917).

Appellee cites with approval *Davis v. United States,* 247 Fed. 394 (8th Cir. 1917). In this case the witnesses were not of tender age nor was it a statutory rape case. The defendants were being held and tried in connection with a train robbery. Except for the possible tumultuous and disorderly conduct of the spectators there would appear to be no reason why the public should have been excluded in the *Davis* case. In the present case, however, the trial judge gave his reasons prior to making the exclusionary order (R-16) when he advised that

> ". . . I think that in view of the tender years of the prosecuting witness and other one of the witnesses referred to by the United States Attorney and the difficulty of obtaining testimony from them before a large audience I think it would be in the furtherance of justice to grant the motion, and therefore the Court grants the motion. . . ."

Certainly the trial judge in view of the *Reagan* and *Callahan* decisions was then in excellent position to ascertain the most prudent course to be followed so that justice would prevail in the case and having done so, his decision should not now be overruled.

The appellant also cites the case of *Tanksley v. United States,* 145 F. 2d 58 (9th Cir. 1944). The court in this excellent opinion written by Judge Denman did not consider the problem raised by this appeal. As a matter of fact on page 60, Judge Denman specifically said that the problem was not considered when he stated:

> "It is not necessary to consider whether there is discretionary power in the trial court to exclude

> from the courtroom minor children, . . . or persons actually disturbing the proceedings, . . . or those likely to create a disturbance, . . . or adults in cases in which, as the trial progresses, facts are developed of pathologic and revolting perversion. Assuming there may be such discretion, the trial court erred in assuming the power of exclusion here exercised at this trial on the charge of rape of an adult woman."

The appellant also cites the case of *United States v. Kobli,* 172 F. 2d 919 (3rd Cir. 1948). This again, like the *Tanksley* case referred to above, does not reach the question presented by the present case and as a matter of fact, the court specifically pointed out on page 923 that they were not ruling on this question when they said:

> ". . . In reaching our conclusion we are, of course, not passing upon the different situation which arises in a case, such as a prosecution for statutory rape, in which the prosecuting witness is of such tender years as to be seriously embarrassed when giving her testimony by the presence of spectators not concerned with the trial. It has been held that in such a case the trial Judge in order to prevent a miscarriage of justice may, during the witness' testimony, exclude all members of the public not directly concerned with the trial."

In all cases cited by both the appellant and the appellee all courts have recognized a limitation of some nature in the right of all members of the public to be in attendance at all phases of all criminal trials. The courts in the cases have some times based this

upon one factor or another but all the authorities cited indicate that in some cases, under proper conditions, there can be exclusionary orders and that if such exclusionary orders are based on valid reasons the discretion exercised by the trial judge should not be overruled. Here the trial judge, prior to making the exclusionary order, explained why he felt such an order was necessary in furtherance of the ends of justice and certainly based on the *Reagan* and *Callahan* cases, his exercise of discretion was a proper one and the exclusionary order was not too broad.

II. THE DISTRICT COURT DID NOT ERR IN ITS INSTRUCTION TO THE JURY ON THE PRESUMPTION OF INNOCENCE.

Appellant did not include this point in his statement of points and designation of the record on appeal (R-31, 32). It further appears that the appellant by his action has precluded a consideration of this possibility because Rule 30 of the Federal Rules of Criminal Procedure provides that:

> ". . . No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict stating distinctly the manner to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Where the appellant did not object to an instruction when given, no error may be assigned on appeal. See *Grant v. United States,* 255 F. 2d 341, 342 (6th Cir. 1958).

This was not assigned as an error in the transcript of record designated by the appellant. It would further appear that there is not sufficient information by way of the appellant's designation of record before the court so that the court can ascertain from the record whether or not the appellant objected at the time the instruction was given; if he did object, the basis for his objection and the grounds of his objection. This would appear to preclude the court from a consideration of this matter on the information available in the record before the court. As a matter of fact, there is no place in the record or even in appellant's brief where the instruction as given is set forth in its entirety. If the court does have sufficient information to consider this instruction to the jury on the presumption of innocence, it would further appear that this matter is not properly before the court for consideration at this time. See *Thiel v. Southern Pac. Co.,* 169 F. 2d 30, 32 (9th Cir. 1948); *Bennett v. Scofield,* 170 F. 2d 887, 889 (5th Cir. 1948); *St. Louis-San Francisco Ry. Co. v. Willingham,* 177 F. 2d 167, 171 (8th Cir. 1949); *Queen Insurance Company v. Larson,* 225 F. 2d 46, 50 (9th Cir. 1955); *Griffin v. Ensign,* 234 F. 2d 307, 316 (3rd Cir. 1956); *Watson v. Button,* 235 F. 2d 235, 237 (9th Cir. 1956).

This is an appeal from a denial of the request to vacate and set aside the judgment of the lower court under Title 28, USCA Sec. 2255, (R-29) and this issue was not presented to the trial court. The cases are legion that a proceeding under Title 28, Section 2255, if the issue was not presented to the trial court, it cannot, for the first time, be raised in the appellate

court. See *Waley v. United States,* 233 F. 2d 804 (9th Cir. 1956); *Walker v. United States,* 218 F. 2d 80 (7th Cir. 1955); *Hornbrook v. United States,* 216 F. 2d 112 (5th Cir. 1954).

Notwithstanding the fact that the appellant did not designate this instruction and the objections thereto, if any, in the designation for record on appeal and notwithstanding that there is not sufficient information before the court to enable the court to consider it at this time, if the court does consider the matter, it is respectfully submitted that on the facts the appropriate decision is not to be found in *Reynolds v. United States,* 238 F. 2d 460 (9th Cir. 1956), but the proper consideration to be given is found in the case of *Shaw v. United States,* 244 F. 2d 930 (9th Cir. 1957), where the court advised:

> "That we are not bound to reverse every case where instructions may have been given notwithstanding the obvious guilt of the defendant and the overwhelming weight of facts which are not even contested."

It is respectfully submitted on the facts that the present case is more like the *Shaw* case than the *Reynolds* case, and if it is considered on the merits the court should sustain the trial judge. Moreover, when the instruction is read in its full context, it will be found to be far less objectionable than the one found in the *Reynolds* case.

III. THIS COURT HAS CONSIDERED ON A PRIOR OCCASION THE PETITION OF THE APPELLANT TO APPEAL IN FORMA PAUPERIS AND DENIED THE SAME (R-4).

The appellant in his brief does not argue the third and fourth specifications of errors set out on page 6 of the brief. It is the contention of the appellee that since this court has already considered this matter before that it would not be proper to reconsider it at this time.

IV. UNDER THE CIRCUMSTANCES OF THIS CASE, THE COURT SHOULD NOT CONSIDER THE QUESTIONS OF RIGHT OF PUBLIC TRIAL AND PRESUMPTION OF INNOCENCE AS RAISED BY THIS PROCEEDING.

It is the position of the appellee that the appellant is attempting, by this proceeding, to do what the cases say he cannot do. He is attempting to use this proceeding as a substitute for an appeal from his original conviction. This he cannot do. See *Burdix v. United States,* 231 F. 2d 893 (9th Cir. 1956); *Hickman v. United States,* 246 F. 2d 178 (8th Cir. 1957); *Davis v. United States,* 214 F. 2d 594 (7th Cir. 1954); *United States v. Trumblay,* 234 F. 2d 273 (7th Cir. 1956). It is the contention of the appellee that the case should not have been considered on its merits in a proceeding under Title 28, Section 2255 by the trial court. The trial court did, however, consider the matter on its merits regardless of the stated rule that Title 28, Section 2255 is no substitute for appeal (R-26).

If the trial court properly considered the matter on its merits under the motion, as the supplemental

opinion of the honorable judge Hodge indicates, and the trial court based on this consideration, denied the defendant's motion, then this honorable court should consider this matter on its merits as to the issues raised in the trial court, which do not include the issues raised under point B of the appellant's brief, namely, that the court erred in its instructions to the jury on the presumption of innocence and this should not, in any event, be considered on appeal.

CONCLUSION.

The exclusionary order of trial judge was not so broad as to violate the Sixth Amendment of the Constitution under the circumstances. Even if it were, this was a proper matter of appeal by the appellant rather than a proceeding of this nature and should not be considered by this court. As to the alleged error on the instruction on the presumption of innocence, this is not properly before the court for the following reasons: It was not properly designated as an error at the proper time by the appellant. There is insufficient designation of the record to determine the exact nature of the instruction and whether an objection was made at the time of trial. Furthermore, this error was not raised in this proceeding below and cannot now be considered by this court. Even if this court did consider the record in its full context on its own motion, it would find that the instruction in its full context was correct or that the error was harmless in the light of the whole record. The abuse of

discretion alleged by the appellant in the trial court denying an appeal *in forma pauperis* is a frivolous designation of error since this matter has once been decided by this court. Therefore, the decision of the lower court should be affirmed and the appellant afforded no relief.

Dated, Anchorage, Alaska,
September 5, 1958.

Respectfully submitted,

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